UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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UNITED STATES OF AMERICA, Plaintiff, v. JOSE VALENTIN MORA, *et al.*, Defendants. AND RELATED CASES	Case Nos. 3:18-cr-00057-MMD-WGC; AND 3:18-cr-00055-MMD-WGC ORDER

I. SUMMARY

Defendant Jose Valentin Mora ("Mora") moves to suppress evidence obtained by means of two wiretaps of two of his cell phones ("Motion"). (ECF No. 322.) Most of Mora's co-defendants have been permitted to join in the Motion.[1] Defendants contend the wiretaps were unlawful and therefore intercepted communications and all derivative evidence must be suppressed. (*Id.*) This Court finds that the affidavits supporting each wiretap application (1) provided full and complete statements of the facts required by statute, and (2) the district judge who issued the wiretap did not abuse his discretion in concluding that the wiretaps were necessary to achieve the objectives of the underlying

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[1]The following joinders were filed in 3:18-cr-57-MMD-WGC: ECF No. 324 (Defendant Jorge Ayala-Chavez); ECF No. 325 (Marcos Antonio Hernandez-Cisneros); ECF No. 326 (Leon DeJesus Munera); ECF No. 327 (Sandy Diaz Tavares); ECF No. 328 (Juan Baca); ECF No. 329 (Shawn Curl); ECF No. 330 (Marco Antonio Ramirez); ECF No. 333 (Richard Rossall); ECF No. 334 (Angel Diaz); ECF No. 335 (Javier Chavez); ECF No. 338 (Elizabeth Reyes-Delacerda); ECF No. 340 (Jose Vega); ECF No. 348 (Ciara Hernandez). Munera subsequently withdrew his joinder at a hearing on September 9, 2019 (ECF No. 423). In 3:18-cr-55-MMD-WGC, the following joinders were filed: (ECF No. 67—Dagoberto Mora-Silva's joinder filed as a motion); ECF No. 79 (joining the same motion refiled in that case as ECF No. 78).) The Court has considered the Motion, the joinders, the government's response (ECF No. 358) and Mora' reply (ECF No. 365.)

criminal investigation into an alleged Mora-led criminal conspiracy. Accordingly, the Court denies the Motion and related supplement.

II. FACTUAL FINDINGS[2]

This case concerns what the government contends is a drug trafficking organization ("DTO") led by Mora ("Mora DTO") that was distributing methamphetamine and various drugs in the Reno-Sparks, Nevada area on or before January and June 2018. The Mora DTO is believed to be supplied methamphetamine by Sureno gang members in the Los Angeles, California area. (ECF No. 358-1 at 30.) Mora has been charged in three separate cases: 3:18-cr-00057-MMD-WGC; 3:18-cr-00055-MMD-WGC, and 3:18-cr-00053-MMD-WGC. The same Motion was filed in the two former cases.

The investigation into the Mora DTO began in January 2018 when Federal Bureau of Investigation ("FBI") agents in Reno, Nevada, received information that Mora was a high-level methamphetamine trafficker controlling a northern Nevada DTO and was importing large amounts of methamphetamine from southern California into northern Nevada. (ECF No. 358-1 at 30–31.) That same month and the following, investigators used a confidential human source ("CHS-1"), who was a paid federal informant, to transact two successful controlled buys of methamphetamine. (*Id.* at 33–38.)

Investigators verified that Mora utilized a cellular telephone (775) 527-6931 ("TT-1") to coordinate distribution of the methamphetamine in northern Nevada. (*Id.* at 30, 32.) CHS-1 informed that TT-1 was used to conduct the transactions. (*Id.* at 31.) An FBI administrative subpoena revealed that TT-1 was subscribed to Mora. (*Id.*) On February 9, 2018, then Magistrate Judge Valerie P. Cooke signed an order authorizing the installation of pen register with global positioning system ("GPS") location capability for TT-1 which the phone service carrier activated the same day. (*Id.*) Another such order was authorized on March 29, 2018. (*Id.*)

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[2]Fed. R. Crim. P. 12(d) provides: "Where factual issues are involved in determining a motion, the court must state its essential findings on the record."

Using GPS location and physical surveillance agents confirmed TT-1's usage, Mora's primary residence and working location. (*Id.* at 31–32.) During physical surveillance, agents observed Mora driving a black Dodge Charger, confirmed as registered to him, making brief stops at multiple locations in northern Nevada believed to be consistent with drug deliveries. (*Id.* at 32.) Investigators combined pen register data with toll analysis and subpoenas to telephone companies to confirm contacts between TT-1 and Defendant Jose Vega in Fernley, Nevada, Defendant Luiz Acuna Grageda in Sparks, Nevada, Defendant Michael Cepada, a/k/a Mike Moreno in Sparks, Nevada, Defendant Michelle Stewart in Reno, Nevada, and Defendant Steven Moreira in North Hollywood, California. (*Id.* at 38–43.) Mora, Grageda, Moreira, and Cepeda are documented Sureno gang members. (*Id.*) One mail cover was also initiated at Mora's residence on March 6, 2018, without producing results. (*Id.* at 66.)

At the beginning of April 2018, the government submitted to District Judge Howard D. McKibben an application pursuant to 18 U.S.C. § 2518 for an order authorizing a wiretap of wire and electronic communications over TT-1 with Mora, Vega, Grageda, Cepeda, Moreira, and Stewart listed as target subjects. (ECF No. 358-1.) The application was supported by a 49-page affidavit by FBI Special Agent Scott Dunn ("First Affidavit"). (*Id.* at 23–72.) Agent Dunn has been employed as a special agent since June 2004. (*Id.* at 23.) After reviewing the application, Judge McKibben authorized the wiretap for TT-1 ("TT-1 Wiretap") on April 2, 2018. (*Id.* at 72.)

A third controlled buy was conducted on April 20, 2018, also using CHS-1. (ECF No. 322 at 4 n.5; ECF No. 358-2 at 33.)

On April 30, 2018, the government submitted another request to extend the TT-1 Wiretap and for the wiretap of a second cellular telephone number (775) 379-4034, believed to be used by Mora. (ECF No. 358-2 at 3–4.) This wiretap request was supported by a roughly 57-page affidavit by Agent Dunn ("Second Affidavit"). (ECF No. 358-2 at 26–83.) Judge McKibben also approved the wiretap on TT-2 ("TT-2 Wiretap"). (*Id.* at 83.)

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Both affidavits contained information regarding minimizing the wiretaps. (ECF No. 358-1 at 68–72; ECF No. 358-2 at 78–83.)

The purposes for the wiretaps included to obtain admissible information regarding:

> (i) the nature, extent, and methods of operation of the narcotics business of the Targets, including the commission of one or more of the Target Offenses; (ii) the identities of the Targets, their accomplices, aiders and abettors, co-conspirators and participants in their illegal activities; (iii) the receipt and distribution of contraband and money involved in those activities; (iv) the locations of contraband and of items used in furtherance of those activities; (v) the existence and locations of records relating to one or more of the Target Offenses; (vi) the location and source of resources used to finance their illegal activities; (vii) the location and disposition of the proceeds from those activities; (viii) any nexus with other drug trafficking organizations; and (x) to dismantle the drug trafficking organization's conspiracy.

(*E.g.*, ECF No. 358-1 at 5.) Dunn's First Affidavit further explains the objectives extended to revealing "the scope of the MORA DTO's operations (including the extent of Jose Mora's involvement), the MORA DTO's sources of supply, its distribution network, its connection to the Sureno street gang, and its connections to regional and international DTOs, and the members thereof." (*E.g.*, *id.* at 45; *see also* ECF No. 358-2 at 36 (Second Affidavit).)

Mora, along with 16 other defendants, were indicted under a superseding indictment[3] on September 26, 2018, in the District of Nevada on various conspiracy, firearms, and drugs charges arising out of their alleged involvement with the Mora DTO. (ECF No. 192.)

Mora filed the instant Motion in 3:18-cr-00057-MMD-WGC on June 27, 2019. (ECF No. 322.) Defendant Dagoberto Mora-Silva joined the Motion in 3:18-cr-00055-MMD-WGC the following day and Mora refiled the same motion in that case on July 29, 2019.[4] (*See* ECF Nos. 67, 78 (3:18-cr-00055-MMD-WGC).)[5] Defendant Shawn Curl also filed a

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[3]The original indictment was issued on June 27, 2018. (ECF No. 74.)

[4]The Court will grant the joinders in 3:18-cr-00055-MMD-WGC (ECF Nos. 67, 79).

[5]All other citations in this section are to the docket in 3:18-cr-00057-MMD-WGC.

supplement to his joinder of the Motion (ECF No. 381-1) which all other noted Defendants orally joined at a hearing on the Motion on August 16, 2019 ("Hearing").[6] (ECF No. 383.)

The arguments discussed below are considered as submitted by Mora and all co-Defendants who joined in the Motion and Curl's supplement.

III. DISCUSSION

Defendants paramountly challenge the legitimacy of the TT-1 Wiretap. (ECF No. 322 at 12–30.) They contend that the government failed to show probable cause of any drug conspiracy or necessity for a wiretap and that the affidavit supporting the TT-1 Wiretap omitted material information. (ECF Nos. 322, 365, 381-1.) Particularly regarding the latter contention, Defendants request a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978) ("*Franks* hearing"). (ECF No. 322 at 13.) At the Hearing, it also became evident that Defendants further argue that the extension of the TT-1 Wiretap *and* the additional TT-2 Wiretap were unlawful as they derive from the information supporting the initial TT-1 Wiretap. (*See, e.g.*, ECF No. 322 at 28 n.79.) The Court considers Defendants' arguments within the framework the Ninth Circuit has provided for considering wiretap affidavits and ultimately decides that Defendants have not demonstrated they are entitled to suppression of the wiretap evidence or allegedly derivative evidence in this case.

A. Defendants' Challenge to the Existence of Probable Cause of a Conspiracy

Before turning to review of necessity, the Court considers Defendants' threshold arguments. First, Defendants contend that the government's investigation into a

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[6]The Court granted Curl's motion to supplement his previous motion to join (ECF No. 381), and the government responded to Curl's supplement (ECF No. 390.) Curl also filed an untimely motion for leave to file his own motion to sever and to join in Defendant Munera's motion to suppress (ECF No. 342) ("Curl's Second Motion to Join"). (ECF No. 391-2.) In Curl's Second Motion to Join, Curl essentially challenges the second wiretap application because it includes information of the traffic stop and evidence obtained that is at issue in Munera's motion to suppress. At a hearing on September 9, 2019 (ECF No. 423), Munera withdrew his motion and thus Curl's joinder was denied as moot. Nonetheless, the Court notes that Curl's contention does not alter the Court's conclusion *infra* that the TT-2 Wiretap was supported by probable cause or that its supporting affidavit is a full and complete statement of the facts.

conspiracy was unsupported by probable cause. (ECF No. 322 at 14–17; ECF No. 381-1 at 6–15.) They essentially contend that the TT-1 Wiretap was itself used to establish the requisite probable cause the government needed in the first instance. (*E.g.*, ECF No. 381-1 at 14.) Defendants next argue that to the extent probable cause of a drug conspiracy was absent, a wiretap was therefore not necessary for investigation into the non-conspiracy drug offenses for which the government already had evidence given the CHS-1 drug buys. (ECF No. 322 at 17–18; ECF No. 381-1 at 14.) The government contends that both affidavits demonstrate probable cause, specifically identifying the probable cause statements in the Second Affidavit and noting the caselaw that the government is entitled to leeway when investigating a conspiracy, discussed *infra*. (ECF No. 358 at 13, 17.) Because the Court finds that the government's investigation into a Mora-led conspiracy was supported by probable cause, the Court does not address Defendants' secondary contention.

"The elements of conspiracy are '(1) an agreement to accomplish an illegal objective, and (2) the intent to commit the underlying offense.'" *United States v. Moe*, 781 F.3d 1120, 1124 (9th Cir. 2015) (quoting *United States v. Herrera–Gonzalez,* 263 F.3d 1092, 1095 (9th Cir. 2001)). *Id.* There is a notable exception to conspiracy liability—the buyer-seller rule. Under this rule "mere sales to other individuals do not establish a conspiracy to distribute or possess with intent to distribute . . .." *Id.* (internal quotation and citation omitted). Further, "[a] conviction for 'conspiracy requires proof of an agreement to commit a crime other than the crime that consists of the sale itself.'" *Id.* (quoting *Lennick*, 18 F.3d at 819). A court reviewing whether it may be reasonably concluded that a conspiracy exists "take[s] into account all . . . the evidence surrounding the alleged conspiracy and make[s] a holistic assessment." *Id.* at 1125.

Defendants maintain that the only assertion of a conspiracy is the statement in the First Affidavit that "[a]ccording to intelligence obtained in the investigation, MORA has connections to the targets." (ECF No. 322 at 16; *see* ECF No. 358-1 at 28.) The Court finds the First Affidavit and certainly the Second Affidavit provide more. To be clear,

establishing probable cause generally only requires that there is evidence to support probability—not a prima facie showing—of criminal activity. *Franklin v. Fox*, 312 F.3d 423, 438 (9th Cir. 2002) (internal quotations and citation omitted). Such evidence need not be admissible, but only legally sufficient and reliable. *Id.* (citation omitted).

As noted, the First Affidavit identified six target subjects at the time. (ECF No. 358-1 at 28–30.) The First Affidavit indicates that Mora and three of the targets are documented Sureno gang members. (*Id.*) It also states, for example, that Grageda is believed to obtain methamphetamine from Mora and utilizes members of another gang, for which Grageda is a founding member, to distribute the methamphetamine in the Reno area. (*Id.* at 29.) It provides that Vega is a distributor to whom Mora also supplies methamphetamine and that Vega additionally obtains drugs from other sources of supply. Cepeda is noted as a close associate of Grageda and also a Sureno gang member. (*Id.*) The Affidavit notes that Moreira is believed to be a supplier of methamphetamine to Mora and has a substantial history of drug trafficking and is a documented Sureno gang member with ties to the Mexican Mafia. (*Id.*) The Affidavit also provides that Stewart is believed to be a drug runner for Mora. (*Id.* at 29–30.) Considered holistically, the Court finds that the First Affidavit establishes more than a transactional relationship between Mora and the other target subjects and supports the probability of a conspiracy to distribute between them. The Second Affidavit builds upon this probability with information as to more targets and communications regarding contact with suppliers and drug couriers working for Mora. (ECF No. 358-2 at 36–52.)

The Court therefore finds that the government's investigation was supported by evidence of probability of an ongoing conspiracy. The Court now turns to the issue of necessity.

B. The Necessity of the Wiretaps

There is a statutory presumption against the intrusive investigative method of a wiretap that the government must overcome before it may obtain one. *U.S. v. Gonzalez, Inc.*, 412 F.3d 1102, 1112 (9th Cir. 2005); *see also U.S. v. Canales Gomez*, 358 F.3d

1221, 1224 (9th Cir. 2004) ("Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2518, prohibits electronic surveillance by the federal government except under specific circumstances."). The government overcomes this presumption only by proving a wiretap is necessary. *Gonzalez, Inc.*, 412 F.3d at 1112. "Together, 18 U.S.C. § 2518(1)(c) and (3)(c) comprise the necessity requirement for wiretap orders." *Id.* There are three alternative methods under 18 U.S.C. § 2518(1)(c) whereby the government may establish necessity for a wiretap. *Id.* "The government may show that traditional investigative procedures (1) have been tried and failed; (2) reasonable appear unlikely to succeed if tried; or (3) are too dangerous to try." *Id.* (citing *United States v. Smith*, 31 F.3d 1294, 1298 n.2 (4th Cir. 1994)). This showing must be supported by "a full and complete statement of the facts." *Canales Gomez*, 358 F.3d at 1224. The wiretap statute "includes its own exclusionary rule, requiring suppression of wiretap evidence that the government obtains in violation of [18 U.S.C. § 2518]." *United States v. Rodriquez*, 851 F.3d 931, 937 (9th Cir. 2017) (citations omitted).

In *Rodriguez*, the Ninth Circuit Court of Appeals clarified that a district court must apply the same two-step process it considers when considering a motion to suppress wiretap evidence. *Id.* at 937–38. First, the court must engage in de novo review to determine whether the information included in the affidavit supporting a wiretap application "amounts to a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." *Id.* at 937 (internal quotations and citation omitted). Second, the court reviews the wiretap-issuing judge's finding that the wiretap was necessary under 18 U.S.C. § 2518(3)(c) and his/her decision to authorize the wiretap for an abuse of discretion. *Id.* (citations omitted).

'Each wiretap application, standing alone, must satisfy the necessity requirement.' *Id.* at 939. Even within the same investigation, the government cannot transfer a statutory showing from one wiretap application to another. *Gonzalez, Inc.*, 412 F.3d at 1115; *see also Rodriquez*, 851 F.3d at 941–42 (citing *United States v. Blackmon*, 273 F.3d 1204,

1222 (9th Cir. 2001)) (explaining that the second affidavit cannot be an "impermissible 'carbon copy' of the first").

The Court addresses the first prong of whether the information in Agent Dunn's two affidavits are full and complete, which requires a examination of Agent Dunn's representation as to necessity, before turning to address the second prong of whether Judge McKibben abused his discretion in authoring the wiretaps.

1. Full and Complete Statement of Facts

The Court's de novo review of whether the affidavits include a full and complete statement of the facts is "critical." *Rodriquez*, 851 F.3d at 938. This is a fact-intensive inquiry confine to only the information in the affidavits. *Id.* at 938–39. The "affidavit must include 'specific facts relevant to the particular circumstances' of the case and not boilerplate conclusions." *Id.* at 939. Boilerplate conclusions are explanations that "merely describe inherent limitations of normal investigative procedures." *Id.* at 941 (citations omitted); *see also Blackmon,* 273 F.3d at 1208 (suppressing wiretap evidence in part because "the [wiretap] application contains *only* generalized statements that would be true of any narcotics investigation") (emphasis added). However, some boilerplate language is permissible because the level of detail in each affidavit is reviewed as a whole—not piecemeal. *Id.* at 942; *see also United States v. Fernandez,* 388 F.3d 1199, 1237 (9th Cir. 2004) (concluding that wiretap affidavit satisfied the requirements of § 2518(1)(c) despite the fact that it included some statements merely describing the inherent limitations of traditional investigative techniques); *United States v. Torres,* 908 F.2d 1417, 1423 (9th Cir.1990) ("The presence of conclusory language in the affidavit will not negate a finding of necessity if the affidavit, as a whole, alleges sufficient facts demonstrating necessity.").

The Court finds that both affidavits include information about traditional methods used before the TT-1 Wiretap and the TT-2 Wiretap were sought for the government to demonstrate necessity. The First Affidavit explains that the government used one confidential human source (CHS-1) to purchase methamphetamine on two separate

occasions. (ECF No. 358-1 at 32–38.) Pen registers with GPS locator, physical surveillance, toll analysis, database checks for relevant data—leads, criminal records, vehicle registration, administrative subpoenas to telephone service providers, one mail cover, and public records checks for property and bank records to acquire information about the Mora-led DTO were also used before seeking the TT-1 Wiretap. (*See generally id.* at 48–67.) The Second Affidavit explained that investigators continued to use many of these traditional methods, and that pen registers, trap and trace information and telephone subscriber information were used in both wiretaps. (ECF No. 358-2 at 31–32.) These methods, and others, in conjunction with the information derived from the TT-1 Wiretap, *inter alia*, revealed ten additional target subjects, that Mora dealt drugs beside methamphetamine, and Mora's dealings in firearms, but failed to identify key information, such as Mora's source of supply. (ECF No. 358-2 at 31–67.)

Importantly, the Second Affidavit is not an exact reproduction of the First Affidavit. Specifically, investigators sought the TT-2 Wiretap because the TT-1 Wiretap was not intercepting certain communications relevant to the target subjects and offenses, even though there was, for example, evidence that Mora had sent drug couriers to pick up supplies in California. (*E.g.*, ECF No. 358-2 at 66–67.) The Second Affidavit additionally reveals that investigators used CHS-1 to conduct another control methamphetamine purchase on April 20, 2018 (ECF No. 358-2 at 53–55.) This affidavit also states that one source of information ("SOI")—albeit with limited knowledge of Mora and the Mora DTO—was identified and that agents continued to solicit information from SOIs. (ECF No. 358-2 at 69–70.) Unlike with the First Affidavit, the Second Affidavit also explains that a pole camera was installed near one of Mora's drug stash houses and agents used mobile ground level devices at Mora's stash house and apartment. (*Id.* at 74.)

In any event, Defendants argue a lack of necessity based on numerous contentions. The defense filed an affidavit by Phillip J. Carson who served with the FBI for over 20 years to support their claims that Agent Dunn's affidavits failed to show necessity

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for the TT-1 Wiretap and the TT-2 Wiretap. (ECF No. 322-3.)[7] Carson attests that the government should have more thoroughly engaged in using normal/traditional methods before seeking a wiretap and alleges that investigators 'cut corners.' (*Id.* at 6, 15.) He specifically contends that the government should have (1) used CHS-1 to obtain further details about suppliers "Bear," "Gordo" and or "Bear's cousin," (2) pursued three individuals ("CS-2, CS-3 and CS-4") and Cepeda as additional potential confidential sources to advance the investigation—primarily due to connections with the Sureno street gang, (3) insert and utilize an undercover agent ("UCA"), (4) pursue financial investigation, (5) put a tracking device on Mora's black Dodge Charger, and (6) install pole cameras. (*Id.* at 6–16.)

The Court considers all contentions, except as to purported suppliers and to the use of CS-2, CS-3, and CS-4 as potential confidential sources, as amounting to a difference of opinion between Carson and Dunn—and the Court's analysis focuses on the content of the latter's affidavit. However, the Court considers Carson's affidavit to the extent it is intertwined with or provides the basis for Defendants' lack-of-necessity arguments discussed *infra*. Upon considering Defendants' arguments, the Court ultimately finds that each of Agent Dunn's two affidavits includes case-specific information on why particular methods—continued or initiated—would not be effective in the Mora DTO investigation or too dangerous.

First, Defendants argue that even assuming there was probable cause of a drug conspiracy there was no genuine necessity for the TT-1 Wiretap over less intrusive means. (ECF No. 322 at 18–21.) To support this point, Defendants reason that the First Affidavit overstates the conspiracy and provides intentionally sweeping boilerplate objectives to manufacture necessity. (*Id.* at 20–21.) As evident from the Court's analysis *supra* and *infra*, the Court disagrees and finds contrary to this contention.

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[7]Notably, Carson's affidavit purports that Agent Dunn "misled" the Court. (ECF No. 322-3 at 3). But it became evident that there is no evidence of explicit misrepresentation, but instead assertions of omissions in Dunn's affidavits—particularly the First Affidavit.

Defendants also argue a lack of necessity, claiming that at the time of the wiretap application, the Mora DTO investigation already satisfied its principal objective—identifying Mora's source of supply. (*Id.* at 21–22.) Defendants specifically argue that the government failed to take action on information it possessed early on regarding "Bear," "Gordo," "Coco" and Moreira as Mora's sources of supply for CHS-1. (*Id.*) Defendants assert that the government's failure to further investigate these sources of supply amounts to a failure to exhaust CHS-1 in relation to "Bear," "Gordo," "Coco" because CHS-1 had their information and a sufficiently intact relationship with them. (ECF NO. 322 at 22–23; *cf.* ECF No. 323-3 at 7–9 (Carson's related statements).) Defendants relatedly claim that the government turned down or failed to act on CHS-1's efforts to identify recruits to further the investigation into the Mora DTO and appear to claim that Agent Dunn's assertion in the First Affidavit that he is "not aware of any other cooperators"—as potential confidential sources—was either misleading or amounted to a material omission. (ECF No. 322 at 24 (claiming Dunn's quoted statement is "inaccurate").) Defendants' position appears to be grounded on Carson's statements that based on information CHS-1 provided, CS-2, CS-3, and CS-4 could have been used as potential confidential sources. (*Id.* at 23–24; ECF No. 322-3 at 7–9.) In sum, Defendants' contention of material omission(s) in the First Affidavit appears to cumulatively consists of lack of information regarding CS-2, CS-3, and CS-4 as potential sources and the failure to include "Bear," "Gordo," and "Coco" as potential suppliers. (*E.g.*, ECF No. 322 at 28.) In this regard, Defendants request a *Franks* hearing.

The Court concludes that Defendants have not made the required initial *substantial* showing that Agent Dunn intentionally or recklessly omitted or misrepresented material information. Defendants may obtain a *Franks* hearing only upon making "a preliminary showing that the wiretap applications contained *material* misrepresentations *or* omissions." *Gonzalez, Inc.*, 412 F.3d at 1110 (citations omitted). In *Gonzalez, Inc.*, the Ninth Circuit Court of Appeals explained that "[o]ur case law does not require clear proof of deliberate or reckless omissions or misrepresentations at the pleading stage. . . .

Instead, at this stage we simply require the defense to make a *substantial showing* that supports a finding of intent or recklessness [to misrepresent or omit material information]." *Id.* at 1111 (emphasis added). In short, a *Franks* hearing "is appropriate where the defendant makes a substantial preliminary showing that a false statement was (1) deliberately or recklessly included in an affidavit supporting a wiretap, and (2) material to the district court's finding of necessity." *United States v. Shyrock*, 342 F.3d 948, 977 (9th Cir. 2003) (citing *United States v. Bennett*, 219 F.3d 1117, 1124 (9th Cir. 2000)); *see also*, *Blackmon*, 273 F.3d at 1222 (suppressing evidence from a wiretap because the circuit court concluded that the wiretap application "contain[ed] material omissions and misstatements" that when removed left a deficient application).)

Here, in briefing and at the Hearing, the government pertinently maintains that information regarding "Bear," "Gordo," and "Coco" was erroneously included in the discovery related to this investigation in that the government was being over-inclusive. (*E.g.*, ECF No. 358 at 4 & n.2.) Of course, Defendants contend otherwise. Considering the lack of record clarity as to "Bear," "Gordo" and "Coco," the Court directed the government to submit additional affidavit by Agent Dunn for *in-camera* review regarding whether these potential sources were pursued and/or determined to be unrelated to the Mora-led DTO investigation. (ECF No. 399.) If the latter determination was made, the government would then need to file a separate affidavit, explaining why information concerning "Bear," "Gordo" and "Coco" was produced as part of the discovery in this case. (*Id.*)

Responding to the Court's directive, the government filed the requested affidavit for *in-camera* review ("Sealed Affidavit") (ECF No. 404) and an unsealed affidavit ("Unsealed Affidavit") (ECF No. 406) on September 5, 2019. Upon reviewing these affidavits, the Court finds the Unsealed Affidavit supports the government's explanation as to why statements relating to "Bear," "Gordo" and "Coco" were included in the discovery for this case. More important, the Court is satisfied after reviewing the Sealed Affidavit that Agent Dunn did not intentionally or recklessly omit *material* information. That is, the Court finds that the

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information as to "Bear," "Gordo" and "Coco" if known to Judge McKibben would not likely alter his determination in issuing the wiretaps.

As to Moreira, the government contends in briefing, without specific citation, that Ninth Circuit precedent establishes that simply identifying a supplier does not establish necessity. (ECF No. 352 at 7 n.3.) At the Hearing, the government noted that Moreira was investigated and identified as a supplier in this case. (*See, e.g.*, ECF Nos. 358-1, 358-2.) Accordingly, the Court concludes that Defendants' relevant arguments as to Moreira are essentially moot.

As to the use of other potential confidential sources and further exhaustion of CHS-1 the government asks that the Court applies the cases of *Caneles Gomez*, *Fernandez*, and *Shyrock*, to reject Defendants' contention that there was a lack of necessity for the TT-1 Wiretap because of a potential for further success with confidential informants. (ECF No. 358 at 18–24.) In their reply brief, Defendants claim that each of these cases are factually distinguishable and uninstructive. (ECF No. 365 at 5–10.) The Court agrees that *Caneles Gomez*, *Fernandez* and *Shryock* are factually distinct, but disagree that they are uninstructive here.

In *Caneles Gomez*, the Ninth Circuit held that "[a] judicially imposed requirement that the government attempts to use all potential informants before securing a wiretap would be impractical and contrary to investigatory experience and the force of our precedent." 358 F.3d at 1227.[8] There, the appeals court reversed a district court's finding that given the apparent availability of confidential informants, the wiretaps were not necessary. *Id.* at 1223. The court noted that the district court improperly waived off affiant's averments regarding the use of these and other informants as "boiler-plate." *Id.* at 1227. The court of appeals took into consideration the unique law enforcement problems presented by the investigations of conspiracies, reiterated that the government is entitled

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[8]To the extent that Defendants argue that *Caneles Gomez* is at odds with congressional intent (ECF No. 365 at 6–7), the Court notes that it is bound to follow the Ninth Circuit's decisions unless they have been undermined by subsequent authority—which is not the case here.

to leeway in this context, and found sufficient that that the supporting affidavit "explained in detail why in light of the broad goals of the investigation the continued use of informants was unlikely to result in the necessary information." *Id.* at 1226–27.

Similarly, in *Shryock* the Ninth Circuit found that necessity existed despite the existence of informants because infiltration by informants into the Mexican Mafia could not determine the scope of the conspiracy. *Shyrock*, 342 F.3d at 976. There too, the circuit court recognized that further use of cooperating informants would not likely realize "all of the investigative objectives" of the conspiracy or reveal the "full nature and extent of the criminal activities of all the major participants in [the Mexican Mafia] and to gather sufficient evidence to successfully prosecute the participants for the target offenses." *Shyrock*, 342 F.3d at 976. In *Fernandez*, the Ninth Circuit found its holding in *Shryock* controlling. *Fernandez*, 388 F.3d at 1236 (citing *Caneles Gomez*, 358 F.3d at 1226 & *United States v. McGuire*, 307 F.3d 1192, 1197 (9th Cir. 2002)).

Defendants argue that as a general matter there is no reasonable analogy between the Mexican Mafia in both *Shryock* and *Fernandez*—which is a large scale-vast-sophisticated organization—and the purported Mora DTO. (ECF No. 365 at 7–9.) Defendants additionally argue that in both *Shryock* and *Fernandez*, and unlike with the Mora DTO, the existence of the Mexican Mafia and its criminal objectives as well as the membership status of targets were established. (*Id.* at 8.) This argument appears to tie back to Defendants' position that the First Affidavit does not establish probable cause of a Mora-led conspiracy, regarding which the Court has reached a contrary conclusion *supra*. (*Id.* (positing that a Mora-led conspiracy and the status of target subjects were merely hypothetical at the time of the first wiretap application and the only factual basis appears to be that Mora was connected to the targets).)

Defendants' positions regarding the distinctions between the alleged Mora DTO and the Mexican Mafia or the facts of the three cases are well-taken. Nonetheless, the three cases cumulatively reflect Ninth Circuit precedent that a court evaluates the necessity of a wiretap in light of "the government's need not merely to collect some

evidence, but to develop an effective case against those involved in the conspiracy." *Rodriquez*, 851 F.3d at 940 (citation omitted). The Ninth Circuit Court of Appeals "have 'consistently upheld findings of necessity where traditional investigative techniques lead only to apprehension and prosecution of the main conspirators, but not to apprehension and prosecution of . . . other satellite conspirators.'" *McGuire*, 307 F.3d at 1198 ; *see also Bennett*, 219 F.3d at 1121 n.3 (disagreeing that an affiants statement that the wiretap was needed to discover the full scope of the conspiracy lack specificity and noting that the court "have consistently upheld similar wiretap applications to discovery major buyers, suppliers, and conspiracy members").

Based on this caselaw, the Court is not convinced that investigators had to exhaust CHS-1's usefulness before seeking the TT-1 Wiretap. *See Caneles Gomez*, 358 F.3d at 1226 ("The government need not show that informants would be useless in order to secure a court-authorized wiretap."). It is clear from Agent Dunn's two affidavits that while the investigators continued to use CHS-1 in the Mora-DTO investigation, including for another controlled by in mid-April 2018, investigators concluded that CHS-1 had only limited knowledge of Mora's associates, sources of supply, or the structure of the DTO to meet the substantial goals of the investigation. (*E.g.*, ECF No. 358-1 at 49.) The Court therefore finds that case-specific reasons supported Agent Dunn's conclusion that relying on CHS-1 without wiretap would not likely achieve the full objectives—or the more material ones—of the investigation.

Furthermore, while Agent Dunn's First Affidavit asserts a lack of awareness of "any other cooperators, or likely cooperators" (ECF No. 358-1 at 51), the continuation of the statement undermines Defendants' contention that the "suggestion" of such was "inaccurate" (ECF No. 322 at 24). In full, Dunn provides:

> I am not aware of any other cooperators, or likely cooperators, with significant information or the ability to assist in our investigation of the *Target Subjects* . . . Given the status of the confidential source and other sources of information available in this investigation, I do not believe that the use of the sources will be sufficient to fulfill the goals of this investigation.

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(ECF No. 358-1 at 51 (emphasis added).) Defendants additionally contend that Dunn's latter statement that he did "not believe that the use of the sources will be sufficient to fulfill the goals of this investigation" is conclusory boilerplate. (ECF No. 322 at 24.) The Court examines each of these arguments in turn.

As indicated, the defense identifies the potential cooperators as CS-2, CS-3, CS-4 and Cepeda. (*E.g.*, ECF No. 322 at 23; ECF No. 323 at 6–9) Notably, Carson's affidavit reflects that CS-2, CS-3, CS-4 would all tie into investigations of "Bear," "Ochoa, aka Gordo," and/or "Coco" as potential suppliers. (ECF No. 322-3 at 6–9.) Agent Dunn's Sealed Affidavit submitted for *in-camera* review confirms the government's response that there was no determined link between these individuals and the investigation into the Target Subjects, including Mora. This is all fully in line with Agent Dunn's statement in the First Affidavit—noted above—that Defendants challenge as "inaccurate."

Further, the First Affidavit addresses why investigators did not pursue Cepeda as a cooperator in this investigation (ECF No. 358-1 at 58–59) although Carson contends that this is "unacceptable" (ECF No. 322-2 at 10). Defendants' claim that Cepeda's cooperation—particularly as a target subject and alleged co-conspirator—could have "single-handedly set the government on course to achieving all of its ambitious investigative objectives" by providing "inside knowledge of the purported drug conspiracy." (ECF No. 322 at 23.) The First Affidavit reveals that Cepeda was interviewed by Reno Police Department ("RPD") officers after his arrest on March 28, 2018 and expressed a desire to work with law enforcement. (ECF No. 358-1 at 58.) The affidavit further notes that due to Cepeda's "lengthy and violent criminal history, including being a registered sex offender, investigators are unwilling to utilize [his] cooperation that could result in [his] early release from custody or dismissal of charges." (*Id.*) Importantly, the First Affidavit additionally explains that Cepeda "did not provide [RPD] any information regarding the MORA DTO's structure, hierarchy, distribution network, or methamphetamine source of supply." (*Id.* at 58–59.) For this reason, Agent Dunn concluded that "it is unlikely that an interview of CEPEDA by the FBI would help achieve the goals of the investigation." (*Id.* at

59.) This information does not lead to an inference supporting Defendants' broad claim that Cepeda could be relied on to "single-handedly" attain the objectives of the investigation into the Mora DTO.

Moreover, it is particularly important that Judge McKibben was informed regarding Cepeda's offer of cooperation. *Cf. United States v. Ippolito*, 774 F.2d 1482, 1486–87 (9th Cir. 1985) (finding statements in affidavit regarding confidential informants' willingness to testify and potential to uncover the entirety of the conspiracy under investigation amounted to material omissions warranting suppression). Additionally, even accepting that Cepeda's cooperation could have revealed information, the Court reiterates the appeals court's statement in *Caneles Gomez* that "[t]he government need not show that informants would be useless in order to secure a court-authorized wiretap." 358 F.3d at 1226 (citation omitted).

In sum, the Court finds Agent Dunn's statement regarding the availability of additional sources is sufficiently supported. The Court accordingly finds contrary to Defendants' argument that Agent Dunn's statement that he did not believe that the use of the sources will be sufficient to fulfill the goals of this investigation was conclusory boilerplate. Based on the foregoing, the Court concludes that the high threshold for a *Franks* hearing has not been established in this case.

Defendants also rely on Carson's affidavit to assert that conducting a financial investigation (or a more complete one) was a condition precedent to seeking a wiretap to support their lack of necessity contention. (ECF No. 322 at 24–26.) Defendants cite no legal authority for this proposition and the Court does not find it persuasive in light of the explanations provided in the two affidavits, although the Court agrees with Defendants that the two affidavits are "facsimiles of each other" concerning the financial investigation (*id.* at 25). (*See* ECF No. 358-1 at 67; 358-2 at 77–78.) The affidavits provide that investigators performed public records checks for property and bank records, but were unable to identify key assets of Mora DTO members or additional subjects through the checks. (*Id.*) They specifically provide that at the relevant times further financial

investigation would have been unproductive because no information regarding bank accounts had been disclosed and there was no information beyond the payment of cash being used to purchase narcotics. (*Id.*) The government argues that such information, in light of the other information provided in the affidavits, does not undermine Judge McKibben's finding of necessity. (ECF No. 358 at 25.) The Court agrees with the government. The Court finds that the affidavits provide reasons why a more expansive financial investigation was unlikely to succeed at the time. The Court also considers the statements in light of the fact that the government need not exhaust all traditional methods of investigation before seeking a wiretap.

Defendants further rely on Carson's affidavit to argue that the government's reasons for declining to introduce a UCA is misleading and belied by the facts. (ECF No. 322 at 26.) Defendants particularly support their contention by focusing on a single detail regarding CHS-1—whether Mora considered him trustworthy—and making reference to a drug transaction that purportedly supports that Mora was willing to sell to strangers. (*Id.*) Indeed, Defendants quote language in the First Affidavit where Agent Dunn notes that "Mora appears to consider CHS-1 a friend, and therefore is more trusting of CHS-1 than Mora would be of a stranger." (ECF No. 358-1.) Relying on Carson, Defendants posit that Mora and CHS-1 had a trusting relationship and that such relationship supports a conclusion that "[t]he government's assertion that a UCA had not [sic] 'trustworthy' sponsor for an introduction with Mr. Mora" is unsupported. (ECF No. 322 at 26.) Defendants' conjecture is based on a misreading of the statements in the First Affidavit. The First Affidavit provides that a UCA had not been used to infiltrate the Mora DTO because such information would not likely accomplish the goals of the investigation. (ECF No. 358-1 at 46.) This conclusion was premised on Agent Dunn's opinion that a successful introduction of a UCA required an informant to vouch for *the UCA's trustworthiness and legitimacy* as a drug trafficker. (*Id.*) The Court reads the affidavit as relevantly speaking of the UCA's trustworthiness—not CHS-1, although the affidavit does in other parts conclude that Mora did not trust CHS-1 enough to share information regarding Mora's timing or movement

relative to obtaining supplies of methamphetamine (ECF No. 358-1 at 49–50). At best, Carson's affidavit only offers that he disagreed with Agent Dunn's assessment of whether Mora trusted CHS-1.

Further, Defendants fail to contend with the other reasons provided in the First Affidavit as to why the introduction of the UCA was unlikely to succeed in a way that would advance the objectives of the investigation or be too dangerous. The First Affidavit explains, *inter alia*, that even if CHS-1 was able to make a successful introduction of a UCA, the UCA would only be at the same level as CHS-1 and thus unable to infiltrate the Mora DTO at a high enough level to learn significant information about its overall operations. (ECF No. 358-1 at 46–48.) Agent Dunn also stated that based on his experience attempts by CHS-1 to introduce a UCA would likely raise Mora's suspicion to terminate his association with CHS-1. (*Id.* at 48.) Finally, the First Affidavit concludes that the risks of introducing a UCA to deal "with violent Sureno gang members" were too great compared to the anticipated limited benefits from such attempts. (*Id.*) The Second Affidavit also reflects that the investigators lacked a connection with ties to the higher levels of the DTO to install a UCA to advance the objectives of the investigation. (ECF No. 358-2 at 70.) The Court finds the statements cumulatively in the First Affidavit and separately in the Second Affidavit amount to sufficient case-specific details even if the Court accepted Defendants' narrow trustworthiness argument.

Defendants also argue that the use of a pole camera and installing a tracking device on Mora's vehicle—his black Dodge Charger—were all readily available investigative options. (ECF No. 322 at 26.) They cite only to Carson's affidavit in support, which essentially explains the utility of a pole camera in an investigation. (*Id.* at n.77 (citing Carson affidavit).) However, the First Affidavit does not question the utility of a pole camera. It specifically states that a pole camera had not been installed because investigators had not been able to secure appropriate locations in the vicinity of the target subjects' residences—for various reasons—to install cameras. (ECF No. 358-1 at 63.) Agent Dunn also concluded in his experience that pole cameras in combination with other

normal investigative techniques alone would not meet the objectives of the investigation because they could not capture sound to disclose the substance of meetings. (*Id.* at 63–64.) While this latter point appears to be an inherent limitation, the Court finds the other reasons provided are sufficiently case specific.

The First Affidavit further explained that if the opportunity arose, investigators will install pole cameras. By the time of the Second Affidavit, investigators had installed a pole camera in the vicinity of Mora's drug stash house and a mobile ground level surveillance camera for the same and Mora's apartment residence. (ECF No. 358-2 at 74.) The Second Affidavit states, however, that the pole camera malfunctioned after installation and the mobile ground surveillance cameras provided limited view of Mora's apartment and stash house. (*Id.*) This is sufficient.

Regarding the placement of a tracking device on Mora's vehicle, Carson explains the efficacy of a tracking device and concludes such is why the government should have used a vehicle tracking device on "Mora's Dodge Charger." (ECF 322-3 at 14.) The First Affidavit provides that investigators had identified the vehicle Mora primarily utilized but had been unable to determine the primary vehicles of other target subjects with any degree of certainty. The affidavit also notes that investigators had been unable to identify a safe and secure location frequented by Mora to install a tracking device. The First Affidavit stated that attempts would be made to install a tracking device once the opportunity arises. These statements, while providing case-specific reasons in conjunction with other unnoted inherent limitations (*see* ECF No. 358-1 at 64), may also be deemed to suggest that the government acted prematurely in seeking the TT-1 Wiretap when considered alone. But, in considering the First Affidavit as a whole, *see Rodriguez*, 851 F.3d at 942, the Court reaches the opposite conclusion.

Beyond the subjects of Defendants' protestations, the First Affidavit provides case-specific details regarding the unlikelihood of achieving the investigation's objectives with only the continued use of physical surveillance in combination with other normal

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investigative procedures and conducting trash searches. (ECF No. 358-1 at 51–55, 62.) The Second Affidavit does the same. (ECF No. 358-2 at 71–72, 73–74.)

In a footnote, Defendants additionally contend that the First Affidavit merely describes inherent limitations in connection with telephone records analysis, searches and seizures, witness immunity, and GPS location data. (ECF No. 322 at 24 & n.63). With the exception of searches and seizures, which the Court addresses below, the Court disagrees.

The First Affidavit explains the progress that had been made with telephone records analysis, but then provides reasons why its continued use in combination with only other normal investigative techniques would not accomplish the goals of the investigation. (ECF No. 358-1 at 60–61.) While Agent Dunn does provide explanations based on his experience with what drug traffickers generally do, he ties that experience into the facts of this case. (*Id.* at 61.) He notes that many of the targets who are in contact with Mora used phones not subscribed to them. (*Id.*) He further notes that "[s]ome phones in contact with TT-1 appear to be prepaid cell phones with generic subscriber information and not billing contact" making it difficult to identify users and "renders phone analysis largely ineffective." (*Id.*) Thus, while Agent Dunn's explanation includes inherent limitations, the Court cannot agree that he "merely" provides inherent limitations.

As to witness immunity, much of the reasons provided in the First Affidavit directly concerns Cepeda, which the Court addressed *supra*. (ECF No. 358-1 at 58–59.) The affidavit otherwise explains that granting immunity to particular witnesses would risk compromising the investigations, with false leads—for example, because investigators were not clear on the relationship among the Mora DTO members and the members of other DTOs. (*Id.* at 59.) The First Affidavit also stated that "[n]o witnesses, nor potential witnesses, ha[ve] been granted immunity because, at this point, investigators are not aware of any witnesses that would further the investigation to approach with an offer of immunity." (*Id.*) The Court finds these statements sufficiently case specific.

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The First Affidavit also highlights accuracy concerns with using GPS location data with particularity to TT-1 and how used of such data had not allowed investigators to identify supply and storing information regarding Mora's methamphetamine. (*Id.* at 65.) While these specific details are interspersed with inherent limitations of GPS location devices, the Court notes that some statements regarding inherent limitations is permissible. *See, e.g.*, *Fernandez,* 388 F.3d at 1237.

The Court finds Agent Dunn's two affidavits do contain some seemingly boilerplate conclusions as to the likely effectiveness of certain techniques, particularly regarding the use of search and seizure warrants, grand jury subpoenas, and further database checks. (ECF No. 358-1 at 55–56, 63; ECF No. 358-2 at 72–73.) However, such conclusions are largely based on Agent Dunn's experienced opinion from his then 14-years working as a special agent. (*See id.*) For example, the affidavits provide that "at this stage" the execution of search warrants would be counter-effective or premature because they would not lead to a full understanding of the structure and operation of the Mora DTO, are generally used to uncover evidence at the conclusion of an investigation, and would disclose or compromise the current investigation. (ECF No. 358-1 at 55–56; ECF No. 358-2 at 72–73.) Agent Dunn also stated that based on his experience and/or belief grand jury subpoenas would either be premature, or risk alerting the target subjects to the investigation or to flee to Mexico. (ECF No. 358-1 at 56–58; ECF No. 358-2 at 73.)

Canales Gomez suggests that conclusions based on such experience should not be considered impermissibly boilerplate. *Canales Gomez*, 358 F.3d at 1227. There, the circuit court concluded that the subject agent "more than adequately as well as convincingly detailed why, using his professional judgment and in his experienced opinion, traditional investigative techniques would not suffice and the continued use of confidential informants would not meet the goals of the investigation." *Id.* The Court thus concludes that Agent Dunn's conclusions regarding search and seizure warrants, and grand jury subpoenas, while arguably boilerplate, were sufficient when he grounded them based on his experience.

In sum, the Court finds that considered in their entirety the affidavits supporting both wiretap applications contain a "full and complete statement" as required by 18 U.S.C. § 2518(1)(c).

2. Whether Judge McKibben Abused His Discretion in Finding Necessity

In determining whether there has been an abuse of discretion, the Court employs a "common sense approach to evaluate the reasonableness of the government's good faith efforts to use traditional investigative tactics or its decision to forego such tactics based on the unlikelihood of their success." *Rodriquez*, 851 F.3d at 944. "Though the wiretap should not ordinarily be the initial step in the investigation, . . . law enforcement officials need not exhaust every conceivable alternative before obtaining a wiretap." *U.S. v. Rivera*, 527 F.3d 891, 902 (9th Cir. 2008) (internal quotation and citations omitted).

The overall arc of Defendants' argument, particularly evident at the Hearing, is that the government acted hastily and cut corners, which includes highlighting that the first wiretap was requested only a short time into the investigation of the Mora DTO, and concluding that necessity is therefore lacking. (*E.g.*, 381-1 at 14 (contending that investigators "placed the cart before the horse").) The pre-wiretap investigation here—roughly short of three months—is similar in duration to the timeframe in *Rodriquez*. In *Rodriquez*, the Ninth Circuit Court of Appeals explained that while the length of an investigation is a factor in a court's reasonableness analysis, there is no minimum amount of days required for such investigation. 851 F.3d at 944. The court, however, considered the range of traditional techniques used within the given timeframe and ultimately concluded that "it does not appear the government sought to use the wiretap as the initial step in its investigation." *Id.*

Here, the Court likewise considers the range of traditional techniques used prior to the request for the TT-1 Wiretap and separately the TT-2 Wiretap. *See* discussion *supra*. The Court additionally consider the explanations provided as to techniques not used and

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concludes that the government did not seek to use the wiretaps, particularly the TT-1 Wiretap, as the initial step in its investigation. *Id.*

Considering the purposes of the investigation into the Mora DTO and the information sought and after reviewing the factual statements in Agent Dunn's two affidavits, the Court concludes that Judge McKibben did not abuse his discretion in finding necessity for the wiretaps in the investigation of the Mora DTO in the circumstances presented here.

3. Whether the Government Needed to Establish Probable Cause and Necessity as to Each Defendant Whose Communication Was Intercepted

Defendants make additional contentions regarding probable cause and necessity that the Court now addresses. Via Curl's supplemental briefing, Defendants contend that the government was required to establish probable cause as to each Defendant not listed as a target in the TT-1 Wiretap and must establish necessity as to each individual target subject of a wiretap. (*E.g.*, ECF No. 381-1 at 20, 25.) The government contends the Ninth Circuit caselaw is to the contrary. (ECF No. 390 at 2–3.) The Court agrees with the government.

In *U.S. v. Reed*, the Ninth Circuit Court of Appeals explained that "[a]uthorization for a wiretap is based on probable cause to believe that the *telephone* is being used to facilitate the commission of a crime, and *the order need not name any particular person if such person is unknown*." 575 F.3d 900, 910 (9th Cir. 2009) (emphasis added). The Court reiterated that the authority to wiretap is tied "to specific communications facilities or locations"—and a cellular phone number, as for TT-1 and TT-2, are considered communication facilities. *Id.* (internal quotations and citation omitted). "Identification of individuals whose communications will be intercepted is only required 'if known.'" *Id.* (quoting 18 U.S.C. § 2518(4)(a)).

Here, it is unquestionable that the government established probable cause to believe that TT-1 and TT-2 were being used to facilitate the commission of at least one target offense noted in the respective affidavits. (*See, e.g.*, ECF No. 358-1 at 30, 38–43,

50 (explaining that investigators verified Mora's use of TT-1 to coordinate sale and distribution of methamphetamine in northern Nevada); ECF No. 358-2 at 37 (stating that "toll records reveal that phones used by a number of the drug traffickers and firearms traffickers have been in contact with TT-2, a cell phone also subscribed to and used by MORA"). There is no allegation that the government intercepted calls on a phone for which it had no order or had not established probable cause. Furthermore, to the extent Defendants now included in the case were not listed in either the First Affidavit or the Second Affidavit—the Court notes that the investigation expressly extended to "others as yet unknown." (*E.g.*, ECF No. 358-1 at 19, 26.)

In light of Ninth Circuit caselaw, the Court finds that the government was not required to establish probable cause and necessity as to each target/unknown subject in order to intercept their communications of illicit activity where the government has established probable cause and necessity for the communication facilities—TT-1 and TT-2.

C. Minimization of the Wiretaps

The Court reviews de novo whether investigators minimized the monitoring of conversations not relevant to its investigation, as required under 18 U.S.C. § 2518(5). *Torres,* 908 F.2d at 1423. "The government has the burden to show proper minimization." *Id.*

> The wiretap statute does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations. Whether the agents have in fact conducted the wiretap in such a manner will depend on the facts and circumstances of each case.

Bennett, 219 F.3d at 1123 (quoting *Scott v. United States*, 436 U.S. 128, 140 (1978)). A standard of reasonableness governs an examination into whether the government adequately minimized its use of a wiretap. *Torres,* 908 F.2d at 1423. By this standard, the government is required to take "reasonable measures to reduce the interception of conversations unrelated to the criminal activity under investigation to a practical minimum while permitting the government to pursue legitimate investigation." *Id.* (citation omitted).

Per Curl's supplemental briefing, Defendants essentially refer to the government's first 10-day report related to the TT-1 Wiretap to argue that investigators failed to minimize because they "failed to minimize any calls at all." (ECF No. 381-1 at 23.) The government counters, arguing that this is insufficient to challenge the government's minimization because it merely assumes failure to minimize and does not attack any particular communications that should have been minimized. (ECF No. 390 at 6–7.) The Court finds that the government took reasonable minimization measures.

Agent Dunn's two affidavits include measures to be implemented to minimize communications not otherwise subject to interception. (ECF No. 358-1 at 68–72; ECF No. 358-2 at 78–83.) Here, Defendants' circular argument of a failure to minimize because calls were not minimized does not undermine that the government's minimization measures were reasonable. *See id.* at 1423 (citation omitted) ("The mere interception of calls unrelated to the drug conspiracy does not indicate a failure to meet the minimization requirement."). The relevant 10-day report reflects that TT-1 was primarily used for texting. (ECF No. 390-1 at 6.) It shows that investigators captured a total of 473 communications (including no answer and voice messages), and that 298 of these communications were drug related. Of the drug-related communications here, 60 were pertinent drug-related *calls* with none minimized. (*Id.*) The remaining 238 were text messages and 81 of those were minimized. (*Id.*) The report specifically notes that the lack of call minimization was due to TT-1 being "predominantly" used for criminal activity. (*Id.*)

Notably, the captured communications between Mora and Curl were text messages. (*Id.* at 11–12.) The report documents that those text messages turned to discussions regarding the purchase of drugs from Mora, evidently for resale by Curl, within only the exchange of several messages. (*Id.*) Pertinently, the wiretaps identify the distribution of controlled substances as a target offense—not just the conspiracy to do the same—and to understand the nature and methods of the narcotics business of the targets—instrumentally Mora. (*E.g.*, ECF No. 358-1 at 27; ECF No. 358-2 at 28.) Moreover, the minimization portion of each affidavit expressly provides that interceptions

would be "suspended immediately . . . unless it is determined during the portion of the conversation already overheard that the conversation is criminal in nature." (ECF No. 358-1 at 68; ECF No. 358-2 at 78.) Based on this record, the Court concludes that the government undertook reasonable measures to minimize communications unrelated to criminal activity under investigation and Defendants provide nothing to suggests that further inquiry on the matter is needed.

Based on the foregoing, the Court concludes that Defendants have failed to establish that the wiretap communications of either TT-1 or TT-2 are entitled to suppression here. Accordingly, Defendants' relevant motion to suppress (as supplemented) is denied.

IV. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the issues before the Court.

It is therefore ordered that the motions to join in 3:18-cr-55-MMD-WGC (ECF Nos. 67, 79) are granted.

It is further ordered that Defendants' motions to suppress (ECF Nos. 322, 381-1 (in 3:18-cr-57-MMD-WGC) and ECF No. 78 (in 3:18-cr-55-MMD-WGC)) are denied.

DATED THIS 11th day of September 2019.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE